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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 RICHARD N. BATSON,
10 BEVERLY J. JONES-BATSON,
11 Plaintiffs,
12 v.
13 DEUTSCHE BANK TRUST
14 AMERICAS, INDEPENDENT TRUSTEE
15 FOR SASTA 2005-3 MORTGAGE
16 BACKED ASSETS 2005-3,
17 MORGAN STANLEY FINANCIAL,
18 OCWEN MORTGAGE SERVICES,
19 NORTH CASCADE TRUSTEE
20 SERVICES,
21 DOES 1-10,
22 ALL OTHERS WITH SECURED
23 INTEREST,
24 Defendants.
25

No. 2:15-cv-00193-SAB

**ORDER DENYING
PRELIMINARY INJUNCTION
AND PARTIALLY GRANTING
MOTION TO AMEND
COMPLAINT**

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1 Before the Court are Plaintiffs' Motion for a Preliminary Injunction¹, ECF
2 No. 149, and Defendant's Motion to Amend the Complaint, ECF No. 97. Plaintiffs
3 Richard Batson and Beverly Jones-Batson appear pro se, and Defendants Ocwen
4 Mortgage Services and Deutsche Bank Trust Americas, Independent Trustee
5 (Defendants) are represented by Robert Norman and Cara Christensen. The
6 motions were heard without oral argument.

7 For the reasons below, the Court **grants in part and denies in part** the
8 motion to amend the complaint, and **denies** the motion for a preliminary
9 injunction. The Court **dissolves** the temporary restraining order in effect and **lifts**
10 the stay in this case.

11 A complaint alleging causes of action for violations of the Real Estate
12 Procedures Act ("RESPA") and various claims under the Washington Consumer
13 Protection Act ("CPA") survives, and the Court orders that a scheduling
14 conference be held to set a case schedule.

15 16 **RELEVANT FACTS**

17 On April 16, 2005, Beverly J. Jones-Batson and Richard N. Batson entered
18 an agreement to purchase the property contested in the instant action, 12910 East
19 Sinto Avenue, Spokane Valley Washington 99216. The Plaintiffs executed a
20 promissory note to finance the home purchase, and the deed of trust was executed
21 on July 3, 2005. The Plaintiffs received their first payment statement in late July
22 2005. The amount due differed "with no explanation, [from the] amount
23 previously outlined." ECF No. 1-3 at 32:18-19. The Plaintiffs then engaged in a
24 five year effort, from July 2005 to October 2010, to "correct, clear up, and
25 eventually end association" with Saxon Mortgage, the original lender. *Id.* at 32:22-
26 23. Once Saxon Mortgage transferred the deed, the Batsons attempted to similarly
27

28 ¹ This order also disposes of ECF No. 74, an earlier version of Plaintiffs' motion for an injunction.

1 contest the terms of their loan with Ocwen, from March 2011 to October 2013. In
2 2009, the Batsons defaulted on their loan payments.

3 The Batsons unsuccessfully attempted to secure information about their loan
4 from Saxon Mortgage, Ocwen, and Deutsche Bank from March 2011 through July
5 2013. After sending a demand letter in July 2014, the Batsons did not receive word
6 from the Defendants until January 2015, when Ocwen began sending letters
7 “claiming debt and attempting debt collection by way of invoices for reinstated
8 loan, required insurance and threats of foreclosure.” *Id.* at 33:13-16. A Notice of
9 Trustee Sale was posted on the property on March 28, 2015, which was filed on
10 June 1, 2015 with the Spokane County Auditor.

11 The Plaintiffs’ filed a complaint on June 26, 2015 in Spokane County
12 Superior Court. ECF No. 1-3. The complaint stated causes of action for Wrongful
13 Foreclosure, Intent to Defraud, Wrongful Claim to Debt Secured by Deed,
14 Violation of Consumer Rights, and Violation of Plaintiffs’ Civil Rights. The case
15 was removed to this Court’s jurisdiction on July 24, 2015, and Plaintiffs moved
16 for a preliminary injunction on August 21, 2015, to halt the trustee’s sale.

17 The Court dismissed Defendant Morgan Stanley with prejudice and
18 dismissed Plaintiffs’ claims for various federal statutory violations, Wrongful
19 Foreclosure, Fraud, and civil rights claims. ECF No. 57. A Real Estate Settlement
20 Procedures Act claim survived. The Court also denied a motion for an injunction,
21 finding Plaintiffs unlikely to prevail on any claim that could halt the foreclosure.

22 Plaintiffs filed a second action in state court, which was promptly removed
23 to this Court. The Court dismissed this second case with prejudice on March 22,
24 2016, on grounds of claim preclusion.

25 Plaintiffs proceeded to file a motion to stay and a motion for a temporary
26 restraining order (“TRO”), which the Court denied. On April 14, 2016, a trial was
27 set for April 10, 2017.

1 Defendants proceeded with the trustee's sale on July 22, 2016, and the
2 property reverted to the trust. In face of the sale of their house, Plaintiffs then filed
3 another motion for a preliminary injunction on August 1, 2016, attesting they
4 would be evicted in days. The Court construed the motion as one for a TRO, and
5 granted the motion. ECF No. 81.

6 A motion hearing was held on Dec. 16, 2016, where argument was heard on
7 the injunction and a motion to strike. The Court concluded it would take the
8 matters under advisement. On Jan. 10, 2017, the Court entered an order staying the
9 case and consideration of the motions until the question of pro bono counsel could
10 be answered. No pro bono counsel was appointed, because there were no
11 volunteers. A lawyer from Seattle volunteered to meet with and provide advice to
12 the Batsons, and his involvement has been very helpful to the Court.

13 Various delays, scheduling conflicts and untimely filings lead to the
14 postponement of the consideration of these motions. After in-person conferences
15 were held in June 2017, the Court gave all parties a final opportunity to file
16 briefing, and stated that the pending motions would be taken under advisement
17 without oral argument.

18 19 **MOTION TO AMEND COMPLAINT, ECF NO. 97**

20 Amendment should be freely given when justice so requires. Fed. R. Civ. P.
21 15(a). There are "Five factors in assessing the propriety of leave to amend—bad
22 faith, undue delay, prejudice to the opposing party, futility of amendment, and
23 whether the plaintiff has previously amended the complaint." *U.S. v. Corinthian*
24 *Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). Amendment is futile if it is evident
25 that that complaint cannot be saved by amendment, *i.e.*, amendment would be
26 futile with no set of facts possible to prove the claim.

27 The Court proceeds to analyze the parties' arguments on each claim as
28 enumerated in the proposed amended complaint, ECF No. 149-1.

1 **1. RESPA Claims.** The Court previously discussed Plaintiffs' alleged
2 RESPA claims. *See* ECF No. 57 at 8. Any claims for RESPA violations occurring
3 after June 23, 2012 (the earliest possible date for RESPA claims to survive the
4 statute of limitations) survive the motion in the complaint, including a pattern and
5 practice claim under 12 U.S.C. § 2605(f)(B). Testing the sufficiency of individual
6 RESPA claims will require factual determinations beyond the scope of a motion to
7 amend. Thus the motion to amend is **granted** for any RESPA claim occurring after
8 June 23, 2012.

9
10 **2. CPA Claims.** Plaintiffs allege CPA claims under several different
11 theories. First, Plaintiffs claim that RESPA violations allow per se CPA claims.
12 This appears to be the case. *See Anderson v. Wells Fargo Home Mortg., Inc.*, 259
13 F. Supp. 2d 1143, 1147 (W.D. Wash. 2003) *Brazier v. Sec. Pac. Mortg., Inc.*, 245
14 F. Supp. 2d 1136, 1142 (W.D. Wash. 2003). Thus any CPA claim predicated on
15 RESPA violations may proceed, and the motion to amend is **granted** in part.

16 As discussed below, because no Deed of Trust Act claim can survive, no
17 CPA claim based on a Deed of Trust Act violation may survive either. This also
18 carries for any conversion or unjust enrichment claim. No unjust enrichment claim
19 can proceed when the claims issue from the contract's subject matter. *Polygon Nw.*
20 *Co. v. Louisiana-Pac. Corp.*, 2012 U.S. Dist. LEXIS 89980, at *16 (W.D. Wash.
21 June 27, 2012).

22 And similarly, no CPA claim based on a violation of the covenant of good
23 faith and fair dealing without specific mention of acts contrary to specific terms
24 contained in the contract, or in this case, the note and deed of trust. *Badgett v. Sec.*
25 *St. Bank*, 116 Wn. 2d 563, 570 (1991). Plaintiffs have not alleged acts by
26 Defendants outside of the enforcement of obligations under the note, and a CPA
27 claim cannot proceed on such a theory.

1 However, Plaintiffs may have sufficiently alleged a CPA claim under an
2 unaddressed theory. As an agreement in writing, the deed of trust foreclosure
3 remedy is subject to a six-year statute of limitations. *4518 S. 256th, LLC v. Karen*
4 *L. Gibbon, P.S.*, 195 Wash. App. 423 (2016). The statute of limitations begins to
5 run when a payment is last made. According to the complaint, Plaintiffs' last
6 payment was around March 2009. Defendants did not start collecting until the
7 unexpired Notice of Trustee Sale was filed on March 17, 2016. Thus, any
8 payments due over six years before March 17, 2016 (or March 17, 2010) are
9 beyond the statute of limitations. Any payments from July 2009 to March 2010 are
10 beyond collection. However, in their notice of foreclosure, Defendant specifically
11 tried to collect on all of the debt incurred by Plaintiffs.

12 It may be a violation of the CPA to collect on debt that is beyond the statute
13 of limitations. *See* RCW 19.16.100. Every act in violation of the CPA potentially
14 renders a defendant liable for a \$2,000 penalty. RCW § 19.86.140; *State v. Ralph*
15 *Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn. 2d 298, 298 (1976) ("Consumer
16 Protection Act vests trial court with power to assess penalty for each violation
17 rather than merely on basis of one penalty per customer."). Further, Plaintiffs'
18 CPA claims may be timely, because these claims accrue when Defendant acts to
19 collect the debt.

20 Plaintiffs may have adequately pled a CPA claim for every attempt to
21 collect stale debt within the statute of limitations of the filing of Plaintiffs' initial
22 complaint. Thus the motion to amend is **granted in part** to allow CPA claims to
23 proceed on this theory, as it does not appear at this point to be futile to allow such
24 a claim to proceed. The parties may address legal or factual arguments as to why
25 this claim is improper in a motion for summary judgment.

26
27 **3. Claims related to Assignment of Deed.** The Court previously discussed
28 Plaintiffs' alleged claims related to the assignment of the deed. *See* ECF No. 57 at

1 6. Borrowers lack the standing to challenge assignments, even fraudulent ones,
2 unless the borrower shows a “genuine risk of paying the same debt twice.”
3 *Borowski v. BNC Mortgage, Inc.*, No. C12–5867 RJB, 2013 WL 4522253, at *5
4 (W.D. Wash. Aug. 27, 2013); *McGill v. Baker*, 147 Wn. 394, 266 P. 138 (1928)
5 (only party to an assignment can challenge its validity). Thus the motion to amend
6 is **denied** in terms of all claims based on the assignment of the deed where
7 Plaintiffs lack standing.

8
9 **4. Intentional Conversion.** Plaintiffs seek to amend their complaint with a
10 cause of action for conversion. To prevail on a claim for conversion, a plaintiff
11 must prove the following elements: (1) that the defendant willfully interfered with
12 a chattel; (2) that the defendant acted without lawful justification; (3) that the
13 plaintiff was entitled to possession of the chattel; and (4) that the plaintiff was
14 deprived of such possession. *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167
15 Wn. 2d 601, 619, 220 P.3d 1214, 1223 (2009). As the Court concluded previously,
16 Defendants complied with the requirements of the Washington Deed of Trust Act,
17 which governs the procedure of non-judicial foreclosures in Washington. Thus, as
18 a matter of law any conversion claims fails as Defendants are lawfully justified in
19 taking possession.

20 Because a conversion claim will necessarily fail as a matter of law, it would
21 be futile to allow Plaintiffs to amend their complaint to allege such a claim. Thus
22 the motion to amend is **denied** for this claim.

23
24 **5. Fraud.** The Court previously dismissed a claim for fraud. See ECF No.
25 57 at 5. The proposed amended complaint does not describe, with the specificity
26 required by Fed. R. Civ. P. 9(b), the “who, what, when, and where” required for
27 fraud claims. *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).
28 The claim for fraud is still legally deficient, and granting the motion to amend the

1 complaint to allow a fraud claim would be futile. The motion is therefore **denied**
2 in terms of amending the complaint to register a claim for fraud.

3
4 **6. False Swearing.** The statute describing false swearing, RCW 61.30.010,
5 applies to “real estate contracts” where deeds are retained by sellers as security. It
6 is undisputed that Plaintiffs’ house is secured by a deed of trust, governed instead
7 by the Washington Deed of Trust Act. Any claim for false swearing would fail as a
8 matter of law, and thus allowing the complaint to reflect one would be futile. The
9 motion to amend the complaint is **denied in part** in terms of a claim for false
10 swearing.

11
12 **7. Washington State Deed of Trust Act (“DTA”) Claims.** The Court
13 concludes that no material violation of the DTA has been alleged. *See* ECF No. 57
14 at 4. Plaintiffs incorrectly rely on authorities to argue that the time for Defendants
15 to foreclose on the property has passed. A foreclosure under the Deed of Trust Act
16 may properly be commenced before the due date of the note. RCW 62A.3-118;
17 *Edmundson v. Bank of Am.*, No. 74016-L, 2016 WL 3853751 (Wash. Ct. App. July
18 11, 2016). Allowing a DTA claim to proceed would be futile, and the motion to
19 amend the complaint as far as reviving a DTA claim is **denied**.

20
21 **MOTION FOR PRELIMINARY INJUNCTION, ECF NOS. 74 & 149**

22 A plaintiff seeking a preliminary injunction must establish: (1) a likelihood
23 of success on the merits; (2) a likelihood that plaintiff will suffer irreparable harm
24 in the absence of preliminary relief; (3) that the balance of equities tips in his
25 favor; and (4) that an injunction is in the public interest. *Winters v. Natural Res.*
26 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

27 Alternatively, Plaintiffs must pass the “serious questions” test, which can
28 justify a preliminary injunction if there are “serious questions going to the merits”

1 and the Plaintiffs demonstrate that “the balance of hardship tips sharply towards”
2 their favor, but only so long as the plaintiff also demonstrates that irreparable harm
3 is likely—not just possible—and that the injunction is in the public interest.
4 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

5 Because the Court concludes that Plaintiffs have not shown a likelihood of
6 success on the merits, there is no need to address the other factors of a preliminary
7 injunction test. The Washington DTA provides “the only means by which one can
8 seek to enjoin a trustee’s sale.” *Andrews v. Countrywide Bank*, No. C15-0428JLR,
9 2015 WL 1487093, at *2 (W.D. Wash. Apr. 1, 2015). None of the causes of action
10 that the Court allows to be inserted into the amended complaint provide a basis for
11 halting the trustee’s sale, nor do they provide a basis for undoing it. Here, the
12 trustee’s sale has already occurred, so any claim by Plaintiffs based on DTA
13 violations would likely fail.

14 However, as the Court previously concluded, and again concludes today,
15 Plaintiffs have not shown any material violation of the DTA process and
16 procedure which allows lenders to obtain a non-judicial foreclosure. See *supra*;
17 ECF No. 56 at 4. The Deed and Note in this case allow Defendants to seek such a
18 foreclosure; and Plaintiffs have been delinquent on their loan for a number of
19 years. The trustee sale complied with the DTA, and the Trustee Deed provided
20 prima facie evidence of compliance. *Plein v. Lackey*, 149 Wn. 2d 214, 228 (2003).

21 Prejudice, independent of the Plaintiffs’ default, must be shown before a
22 trustee’s sale will be set aside. *Bavand v. OneWest Bank, FSB*, 587 F. App’x 392,
23 394 (9th Cir. 2014). Because the foreclosure and trustee’s sale proceeded through
24 the proper procedure with proper notice given, no prejudice has been shown.

25 For the above reasons, the motions for a preliminary injunction have not
26 shown a likelihood for success on the merits, and are **denied**.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Motion for a Preliminary Injunction, ECF No. 149, is **DENIED**.

2. The Temporary Restraining Order preventing foreclosure or eviction of Plaintiffs from the property in question is **DISSOLVED**.

3. The stay in this case is **LIFTED**.

4. Plaintiffs' earlier motion for an injunction, ECF No. 74, is **DENIED**.

5. Plaintiffs' Motion to Amend the Complaint, ECF No. 97, is **GRANTED IN PART AND DENIED IN PART**, as described above. A complaint alleging claims in accordance with this Order may be filed.

6. The parties shall provide dates of availability to the Courtroom Deputy for a scheduling conference to be held no later than October 1, 2017.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order and provide copies to counsel and to pro se Plaintiffs.

DATED this 30th day of August, 2017.



Stanley A. Bastian

Stanley A. Bastian
United States District Judge